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Timothy L. Nesbitt

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## Removal of Voting Power From Members of Non-Profit Organizations

Timothy L. Nesbitt\*

QUESTIONS OF VOTING POWER in corporations have been litigated many times.<sup>1</sup> The right to vote in corporate matters has been declared to be a property right.<sup>2</sup> In business corporations the right to vote shares of stock having voting powers ordinarily is viewed as an incident of legal ownership,<sup>3</sup> and to deprive a stockholder of the right to vote is to deprive him of an essential attribute of his property.<sup>4</sup> A New York court stated, in *Lord v. Equitable Life Assurance Society*,<sup>5</sup> that "The right to vote for directors therefore, is the right to protect property from loss . . . In other words, it is the right which gives the property value and is part of the property itself, for it cannot be separated therefrom." An Ohio court long ago stated that "The right to vote is an incident of ownership of stock, and can not exist apart from it."<sup>6</sup>

Statute provisions as to voting in non-profit organizations are inadequate both in coverage and precision. There appears to be some divergence of views among the various courts as to the existence of a property right in voting aspects of non-profit organizations. Since the right to earn a living has been deemed to be property within the concept of the Fifth Amendment to the Federal Constitution, *a fortiori* membership in a trade union, in the service of its interest, is a property right which the courts will protect.<sup>7</sup> The National Labor Relations Act recognizes that

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\* B.B.A., Western Reserve University; Third-year student at Cleveland-Marshall Law School of Baldwin-Wallace College.

<sup>1</sup> See, 3 Oleck, *Modern Corporation Law*, ch. 57, 58 (1959, with 1965 suppl.), as to statute provisions and voting control methods.

<sup>2</sup> *Shinkle v. Dalton Adding Machine Co.*, 19 Ohio N.P. (NS) 104, 26 Ohio Dec. N.P. 588 (1916); *Lord v. Equitable Life Assurance Society*, 194 N.Y. 212, 87 N.E. 443 (1909).

<sup>3</sup> *Drob v. National Memorial Park, Inc.*, 28 Del. Ch. 254, 41 A.2d 589 (1945); *In re Giant Portland Cement Co.*, 26 Del. Ch. 32, 21 A.2d 697 (1941); *McLain v. Lanova Corp.*, 28 Del. Ch. 176, 39 A.2d 209 (1944); *Tracy v. Brentwood Village Corp.*, 30 Del. Ch. 296, 59 A.2d 708 (1948); *Miller v. Ratterman*, 47 Ohio St. 141, 24 N.E. 496 (1890); *Lord v. Equitable Life Assurance Society*, *supra* n. 2; *Johnson v. Heap*, 1 Wash.2d 316, 95 P.2d 1039 (1939); *Reimer v. Smith*, 105 Fla. 671, 142 So. 603 (1932).

<sup>4</sup> *Lord v. Equitable Life Assurance Society*, *supra* n. 2; *Stokes v. Continental Trust Co.*, 186 N.Y. 285, 78 N.E. 1090 (1906); *Kinnan v. Sullivan Country Club*, 26 N.Y. 213, 50 N.Y.S. 95 (1898).

<sup>5</sup> 194 N.Y. 212, 87 N.E. 443, 448 (1909).

<sup>6</sup> *Griffith v. Jewett*, 9 Ohio Dec. Reprint 627, 632, 15 Cinc. L. Bul. 419 (1886).

<sup>7</sup> See, Oleck, *Non-Profit Corporations, Organizations and Assns.*, 279, 280 (2d ed. 1965); *DeMille v. American Federation of Radio Artists*, 31 Cal.2d 139, 187 P.2d 769, 175 A.L.R. 382, cert. den. 333 U.S. 876 (1947), citing, *Lo Bianco v. Cushing*, 117 N.J. Eq. 593, 177 A. 102 (1935); *Dusing v. Nuzzo*, 29 N.Y.S.2d 882, aff'd. 31 N.Y.S.2d 849 (1941) and *Cameron v. International Alliance*, 118 N.J.Eq. 11, 176 A. 692, 697, 700, 97 A.L.R. 594 (1935).

rights of members of unions are economic in nature, so as to constitute property rights.<sup>8</sup> It has been held that a member of a voluntary association, not a charity, has a property right in its assets.<sup>9</sup> A recent Ohio case even said that, "Inherent in memberships in churches, or any other non-profit incorporated or unincorporated organizations and societies, is the right to a share of the organization's properties . . . a property right does exist."<sup>10</sup> Yet, a member of a club organized as a corporation not for profit, whose membership is terminated, has no right or interest in the property of the corporation except such as is given him by the articles and regulations of the corporation.<sup>11</sup> In situations where life memberships are used, the member is a part owner of the property of the organization only during his lifetime.<sup>12</sup>

Some courts refuse to accept the property right theory. An Indiana court approached the right to vote in an election for officers of a voluntary association as a right stemming from membership, but treated it as a privilege extended by the organization's constitution to members in good standing.<sup>13</sup> The court proceeded to say, "Membership in an unincorporated association . . . is a privilege and is neither a civil nor property right."<sup>14</sup> A like conclusion was reached by a New York court in response to a petition to set aside the election of directors of the New York State Council Knights of Columbus.<sup>15</sup> The court said that a member of a *charitable* corporation does not have a vested right to vote for its directors or trustees, as he has no interest in the property of the corporation.<sup>16</sup> The same conclusion was reached in an earlier New York decision which held that members of a charitable corporation, a hospital, did not have a vested right to vote for trustees, and that such right was not constitutionally protected.<sup>17</sup>

In an attempt to resolve the problem, some courts have developed a contract theory which is used as a substitute for finding a property

<sup>8</sup> National Labor Relations Act, 29 U.S.C.A. Supp., sec. 101 amending sections 8a (3), (5), and 9 (3).

<sup>9</sup> Bacon v. Paradise, 318 Mass. 649, 63 N.E.2d 571 (1945), citing, Balukonis v. Lithuanian Roman Catholic Benefit Society, 272 Mass. 366, 172 N.E. 505 (1930); Hamaty v. St. George Ladies Society, 280 Mass. 58, 181 N.E. 775 (1932).

<sup>10</sup> Randolph v. First Baptist Church, 68 Ohio L. Abs. 100, 120 N.E.2d 485, 488 (1954).

<sup>11</sup> Chestnut Beach Association v. May, 44 Ohio App. 217, 184 N.E. 856 (1933); DeBruyn v. Golden Age Club of Cheyenne, 399 P.2d 390 (Wyo. 1965).

<sup>12</sup> Flaherty v. Manufacturers' Club of Philadelphia, 104 Pa. Super 546, 159 A. 209 (1932).

<sup>13</sup> State ex rel Givens v. Superior Court of Marion County, 233 Ind. 235, 117 N.E.2d 553 (1954).

<sup>14</sup> *Ibid.*, 117 N.E.2d at 555, citing, 7 C.J.S., Associations, sec. 23, p. 56.

<sup>15</sup> Petition of Sousa, 203 N.Y.S.2d 3 (Sup. Ct., 1960). Also see McClintock, Equity 434 (2d ed. 1948).

<sup>16</sup> *Ibid.*, 203 N.Y.S. 2d at 5.

<sup>17</sup> In re Mt. Sinai Hospital, 250 N.Y. 103, 164 N.E. 871 (1928); see also Westlake Hospital Association v. Blix, 13 Ill.2d 183, 148 N.E.2d 471, app. dismissed 358 U.S. 43, 79 S. Ct. 44, 3 L. Ed.2d 43 (1958).

right. An early Massachusetts case held that "The by-laws constituted in effect a contract between the different members and the corporation."<sup>18</sup> This view also is followed in Alabama,<sup>19</sup> Illinois,<sup>20</sup> Kansas,<sup>21</sup> Louisiana,<sup>22</sup> Minnesota,<sup>23</sup> New York,<sup>24</sup> Ohio,<sup>25</sup> and Oklahoma.<sup>26</sup> (*Harington v. Sendall*, 1 Ch. 921, a 1903 decision, apparently maintains this same rule for England.) Members are presumed to be acquainted with the constitution, by-laws, and regulations.<sup>27</sup> One court pointed out that, "In churches, lodges, and all other like voluntary associations each person, on becoming a member, either by express stipulation or by implication, agrees to abide by all rules and regulations adopted by the organization . . ." <sup>28</sup> A voluntary association may adopt by-laws and rules which will be controlling as to all questions of doctrine or internal policy,<sup>29</sup> provided such by-laws and rules are not immoral, unreasonable, contrary to public policy, nor in contravention of the law of the land.<sup>30</sup> The by-laws reflect a member's rights in the organization. In light of this an appeal to a constitutional bill of rights (which is designed to protect the citizen against oppression by the *government*) is usually unsuccessful.<sup>31</sup> Since the constitution and by-laws of a voluntary association are of no

<sup>18</sup> *Boston Club v. Potter*, 212 Mass. 23, 98 N.E. 614, 615 (1912), citing, *Flint v. Pierce*, 99 Mass. 68, 70, 96 Am. Dec. 691 (1868); *Dolan v. Court Good Samaritan*, 128 Mass. 437 (1880).

<sup>19</sup> *Waugaman v. Skyline Country Club*, 277 Ala. 495, 172 So.2d 381 (1965).

<sup>20</sup> *Bostedo v. Board of Trade*, 227 Ill. 90, 81 N.E. 42 (1907); *Werner v. International Association of Machinists*, 11 Ill. App.2d 258, 137 N.E.2d 100 (1956), cert. denied; *O'Brien v. Matual*, 14 Ill. App.2d 173, 144 N.E.2d 446 (1957). The latter two cases both involve disputes in labor unions and point out how the rule in the leading case is applied.

<sup>21</sup> *Lake of the Forest Club v. Buttles*, 142 Kan. 538, 51 P.2d 18 (1935).

<sup>22</sup> *Colonial Country Club v. Richmond*, 19 La. App. 272, 140 So. 86, 87 (1932), citing the rule in 11 C.J. 924; *Elfer v. Marine Engineers Beneficial Association No. 12*, 179 La. 383, 154 So. 32 (1934), citing 5 C.J. "Associations," Sec. 72, p. 1355.

<sup>23</sup> *Anderson v. Amidon*, 114 Minn. 202, 130 N.W. 1002 (1911); *Rensch v. General Drivers, Helpers, and Truck Terminal Emp. Local 120*, 268 Minn. 307, 129 N.W.2d 341 (1964), illustrating the result of a breach of the contract on the part of the union.

<sup>24</sup> *People v. New York Motor Boat Club*, 70 Misc. 603, 129 N.Y.S. 365 (1911), showing that a member following the method prescribed in the by-laws for resignation was acting in accordance with the contract.

<sup>25</sup> *Leahigh v. Beyer*, 67 Ohio L. Abs. 69, 116 N.E.2d 458 (1953), which holds that having established the contractual basis for membership in unions, internal remedies within the by-laws must be exhausted before resorting to the courts, and a by-law denying the right to appeal is not unconstitutional.

<sup>26</sup> *Oklahoma Association of Insurance Agents v. Hudson*, 385 P.2d 453 (Okla. 1963).

<sup>27</sup> *Colonial Country Club v. Richmond*, *supra* n. 22.

<sup>28</sup> *Langer v. North Central Association of Colleges and Secondary Schools*, 23 F. Supp. 694, 699 (D.C. Ill. 1936), *aff'd.*, 99 F.2d 697 (7th Cir. 1938).

<sup>29</sup> *Bostedo v. Board of Trade*, *supra* n. 20; *Ginossi v. Samatos*, 3 Ill. App.2d 514, 123 N.E.2d 104 (1954); *Campbell v. Brotherhood of Railroad Trainmen*, 4 Ohio App.2d 81, 212 N.E.2d 650 (1965).

<sup>30</sup> *Greene v. Board of Trade*, 174 Ill. 585, 51 N.E. 599 (1898).

<sup>31</sup> *In re Mt. Sinai Hospital*, *supra* n. 17; *Westlake Hospital Association v. Blix*, *supra* n. 17.

legal validity and effect except as contracts among members, they are binding only on members who are shown to have assented to them.<sup>32</sup>

Dissatisfied members of non-profit organizations generally appeal to courts of equity. But the office and jurisdiction of a court of equity, unless enlarged by express statute, sometimes are said to be limited to the protection of rights of property.<sup>33</sup> As stated by an Ohio court “. . . courts of equity have no authority to interfere with the action of voluntary and unincorporated associations where no property right is involved.”<sup>34</sup> Yet, the term “property right” is understood to include contract rights, and any civil right of a pecuniary nature, whether technically “property” or not.<sup>35</sup> In many cases, the slightest color of, or circumstances tending to suggest, a so-called “property right,” is grounds for jurisdiction. This tendency indicates that the principle supposedly limiting the jurisdiction of equity to the protection and enforcement of property and contract rights lacks substantial basis. Some courts have said that equity will protect purely personal rights.<sup>36</sup> A federal court has clearly stated that:

The doctrine that equity jurisdiction is limited to the protection of property rights conflicts with the familiar principle that equity may give preventive relief when the legal remedy of money damages, if available at all, is inadequate to redress a wrong. Obviously money has little in common with such personal rights or interests as reputation, domestic relations, or membership in non-profit organizations.<sup>37</sup>

It then goes on to say that injunctions are much better suited to protect interests of personalty than a speculative action for damages.<sup>38</sup> Ohio courts are in accord with the federal view, and have recognized that in a great number of cases the courts have issued injunctions to protect purely personal rights.<sup>39</sup>

<sup>32</sup> Leahigh v. Beyer, *supra* n. 25, *obiter dictum*.

<sup>33</sup> State ex rel Moyer v. Baldwin, 77 Ohio St. 532, 546, 83 N.E. 907 (1908); Riggs v. Cincinnati Waiters Alliance Local, 5 Ohio N.P. 386, 8 Ohio Dec. N.P. 565 (1898). See Oleck, *Maxims of Equity Re-Appraised*, 6 Rutgers L. Rev. 528 (1952).

<sup>34</sup> State ex rel Ohio High School Athletic Assn. v. Judges of the Court of Common Pleas of Stark County, 173 Ohio St. 329, 181 N.E.2d 261 (1962), quoting from 5 Ohio Jur. 2d 440, sec. 7 and Boblitt v. Cleveland, Cincinnati, Chicago and St. Louis Ry. Co., 73 Ohio App. 339, 56 N.E.2d 348 (1943).

<sup>35</sup> International News Service v. Associated Press, 248 U.S. 215, 236, 63 L. Ed. 211 (1918).

<sup>36</sup> Randolph v. First Baptist Church, *supra* n. 10, 489 ff. has an excellent treatment of this point; Stark v. Hamilton, 149 Ga. 227, 99 S.E. 861 (1919), in this case the court granted a prohibitive injunction against a man who had induced a minor girl to abandon her parental home and live with him; also see 6 Am. Jur. 2d, Associations, sec. 40.

<sup>37</sup> Berrien v. Pollitzer, 83 U.S. App. D.C. 23, 165 F.2d 21, 22 (1947) referring to Chafee, *Does Equity Follow the Law of Torts?* 75 U. of Pa. L. Rev. 1, 27, 35 (1926-7).

<sup>38</sup> *Ibid.*, quoting from Chafee, *The Internal Affairs of Associations Not for Profit*, 43 Harv. L. Rev. 933, 938 (1929-30).

<sup>39</sup> Snedaker v. King, 111 Ohio St. 225, 145 N.E. 15 (1924). See dissenting opinion of Marshall, C.J., at 245, for this analysis.

Judicial interference in the internal affairs of a voluntary association is justified where there is a violation of contract obligations or an invasion of property rights.<sup>40</sup> Thus, courts will not hesitate to entertain jurisdiction and afford relief where property rights<sup>41</sup> or purely personal rights<sup>42</sup> are involved.

In *American Aberdeen-Angus Breeders' Association v. Fullerton* the court held that a non-profit corporation may make any reasonable regulation (i.e., limiting voting rights) for election of directors by members or convention where no conflict with a state statute is present.<sup>43</sup> The same court in a later case reasoned that the State, through the legislature, retains the right to amend the statute, and the organization, pursuant to the statute, reserves the power to amend the by-laws. It thus would follow that the right of members of a charitable corporation to vote is not constitutionally protected.<sup>44</sup> This rationale was followed by New York in a case where the state legislature passed a statute amending the charter of a charitable corporation so as to provide for the election of trustees by trustees whose terms have not expired instead of by the members of the organization.<sup>45</sup> The court stated that the right of members of a charitable corporation to vote for trustees is not a vested interest entitled to protection under the Constitution. It further held that there was no denial of due process of law by making the board of trustees self-perpetuating and transferring the right to vote from the members to the board itself. Prior to the *Mt. Sinai* decision the court had enlarged its holding to include membership in non-profit corporations by finding that by-law provisions creating a self-perpetuating board of managers do not infringe on any property or other enforceable right of members.<sup>46</sup>

In the absence of rules to the contrary, an association acting through its members may elect such officers as it chooses.<sup>47</sup> Regulation of the election is by the articles of the association or the constitution and by-laws of the organization, or, if none exist, by the usage of the association and regulations adopted by it.<sup>48</sup> An Indiana court held that "The major-

<sup>40</sup> *Green v. Obergfell*, 73 U.S. App. D.C. 298, 121 F.2d. 46, 138 A.L.R. 258, cert. den. 314 U.S. 637 (1941); *Werner v. International Association of Machinists*, *supra* n. 19.

<sup>41</sup> *Supra* n. 33.

<sup>42</sup> *Supra* n. 36.

<sup>43</sup> *American Aberdeen-Angus Breeders' Association v. Fullerton*, 325 Ill. 323, 329, 330, 156 N.E. 314 (1927); *Mackey v. Moss*, 278 Ala. 713, 175 So.2d 749 (1965).

<sup>44</sup> *Westlake Hospital Association v. Blix*, *supra* n. 17.

<sup>45</sup> *In re Mt. Sinai Hospital*, *supra* n. 17.

<sup>46</sup> *Bailey v. American Society for Prevention of Cruelty to Animals*, 282 App. Div. 502, 125 N.Y.S.2d 18 (1953) *aff'd*. 307 N.Y. 679; *Petition of Sousa*, *supra* n. 15; *Leahigh v. Beyer*, *supra* n. 25.

<sup>47</sup> *Ostrom v. Greene*, 161 N.Y. 353, 55 N.E. 919 (1900).

<sup>48</sup> *Grand Rapids Guard v. Bulkley*, 97 Mich. 610, 57 N.W. 188 (1893); *Stempel v. Rubing*, 4 N.Y.S. 534 (1889); *In re Osteopathic Hospital Ass'n. of Delaware*, 41 Del. Ch. 369, 195 A.2d 759 (1963).

ity rule is final unless it violates property rights or liberties protected under the constitution and laws of the state.”<sup>49</sup> Elections must be held in accordance with the by-laws and constitution of the society.<sup>50</sup> If the action by a member is concerned solely with the question of proper title to an office in a club or other non-profit organization, a court of equity has no jurisdiction, the remedy of *quo warranto* being available.<sup>51</sup>

It may thus be seen that the court will not interfere with the internal affairs of a religious organization when no property rights are involved.<sup>52</sup> It has been pointed out that courts will accept as conclusive the decision of an association tribunal except in cases involving a property right.<sup>53</sup> Lacking a method for redress of grievances, a member of a non-profit organization may turn to the court of equity to enjoin any unlawful act by the organization towards one of its members.<sup>54</sup> Minority stockholders in business corporations may bring an action when the directors and majority have breached their fiduciary duties to the minority.<sup>55</sup>

The *Ethical Practices Code* of the AFL-CIO states that:

1. Each member of a union should have the right to full and free participation in union self-government. This should include the right (a) to vote periodically for his local and national officers, either directly by referendum vote or through delegate bodies, (b) to honest elections, (c) to stand for and to hold office, subject only to fair qualification uniformly imposed, (d) to voice his views as to the method in which the union's affairs should be conducted.<sup>56</sup>

It is evident that the right to vote in non-profit organizations has been judicially recognized but has received uneven protection.<sup>57</sup> As a general rule, unless the right to vote is specifically restricted, every member of a non-profit organization is entitled to vote. The right to vote may be defined in the provisions by which the organization is governed, and in that case the right to vote is restricted to those within the terms of the

<sup>49</sup> *Standberry v. McCarty*, 238 Ind. 338, 149 N.E.2d 683, 686 (1958); *State ex rel Givens*, *supra* n. 13; 45 Am. Jur., Religious Societies, sec. 61.

<sup>50</sup> *Long v. Harvey*, 177 Pa. 473, 35 A. 869 (1896).

<sup>51</sup> *Hornady v. Goodman*, 167 Ga. 555, 146 S.E. 173 (1928). This rule was questioned in *Cummings v. Robinson*, 194 Ga. 336, 21 S.E.2d 627, 634 (1942) which points out that the decision that *quo warranto* was the more “speedy remedy,” was not concurred in by all the justices and is not binding as precedent.

<sup>52</sup> *Gibson v. Singleton*, 149 Ga. 502, 101 S.E. 178 (1919).

<sup>53</sup> Note, *Protection of Membership in Voluntary Associations*, 37 Yale L. J. 368 (1927-28), citing *State ex rel Buckner v. Landwehr*, 261 S.W. 699 (Mo. App. 1924) and others. *Howard v. Betts*, 190 Ga. 530, 9 S.E.2d 742 (1940) citing 5 C.J. 1357.

<sup>54</sup> *Engel v. Walsh*, 258 Ill. 98, 101 N.E. 222 (1913), rehearing denied. This was a case in which the court held the labor union was acting lawfully and properly within its own rules in fining a member.

<sup>55</sup> *Kruger v. Gerth*, 16 N.Y.2d 802, 210 N.E.2d 355 (1965).

<sup>56</sup> *Summers, Judicial Regulation of Union Elections*, 70 Yale L.J. 1221, 1236 (1961), n. 87, citing the AFL-CIO Ethical Practices Code on Union Democratic Processes.

<sup>57</sup> *Ibid.*, 1230 ff.

governing provision.<sup>58</sup> Illinois courts, for example, have held that an organization not for profit may adopt a constitution or by-laws by which the members can be deprived of the right to vote for the election of trustees.<sup>59</sup> As long as even one court will rule that the voting power is a basic contractual right which cannot be taken away without consent, some member will protest the deprivation or dilution of his voting power.

State statutes regulating voting rights of non-profit organizations offer little help in assuring the right to vote. Most statutes permit articles or by-laws of the organization to limit or eliminate the members' voting rights.<sup>60</sup> The Model Non-Profit Corporations Act, showing the heavy influence of general business corporation law, distinctly fails to protect the individual member.<sup>61</sup> The proposed Non-Profit Organization Act suggested by Professor Oleck in his book, *Non-Profit Corporations, Organizations and Associations*,<sup>62</sup> contains the provision that "directors other than those named in the certificate of incorporation shall be elected by the members and other persons entitled to vote."<sup>63</sup> His proposed provision views the members, not the directors or trustees, as the basic repositories of voting power. This view is consistent with the true nature of voluntary associations not for profit, and is the best way to protect members' rights.

<sup>58</sup> *Randolph v. Mt. Zion Baptist Church of Newark*, 139 N.J. Eq. 605, 53 A.2d 206 (1947).

<sup>59</sup> *People ex rel Hoyne v. Grant*, 283 Ill. 391, 119 N.E. 344 (1918).

<sup>60</sup> Illinois: "The right of the members, or any class or classes of members, to vote may be limited, enlarged or denied to the extent specified in the articles of incorporation or the by-laws." Ill. Stats. 32, sec. 163a 14.

Ohio: "Except as otherwise provided in the articles or the regulations, each member, regardless of class, shall be entitled to one vote on each matter properly submitted to the members for their vote . . ." Ohio Rev. Code, sec. 1702.20.

California: "The authorized number and qualifications of members of the corporation, the different classes of membership, if any, the property, voting, and other rights and privileges of members . . . shall be set forth either in the articles or in the by-laws, . . ." 25 Cal. Code, sec. 9301.

<sup>61</sup> ALI-ABA Model Non-Profit Corporations Act, sec. 15, Voting (1964 revision).

<sup>62</sup> Prentice-Hall, 2d ed., 1965.

<sup>63</sup> *Id.* at 575, 583: Proposed Non-Profit Organizations Act, Article XVIII, sec. 52.